of *Bissel* v. *Jeffersonville*,* where it was again held that it was too late to make such objections as against innocent holders, or even against the railroad, when it appeared that the bonds purporting on their face to have been executed by authority, had been issued and delivered. Very stringent application of the same rule was made in the case of *Mercer County* v. *Hacket*,† which is the last of the series to which reference will be made,—all of these cases, proceeding upon the ground that the construction of a railroad for travel and transportation was a public improvement, and that it was competent for the legislature to authorize municipal corporations to furnish material aid for such a work, and we have no doubt that the views of the court were entirely correct. Like the preceding, the present case has respect to a plank-road, but we repeat, that where such an improvement is authorized by the legislature and is connected with the municipality issuing the bonds, the case properly falls within the same rule. It follows that the declaration was sufficient, and that the demurrer should have been overruled.

The judgment of the Circuit Court is therefore reversed, with costs, and the cause remanded for further proceedings, in conformity with the opinion of this court.

JUDGMENT ACCORDINGLY.

CUMMINGS v. THE STATE OF MISSOURI.

1. Under the form of creating a qualification or attaching a condition, the States cannot in effect inflict a punishment for a past act which was not punishable at the time it was committed.
2. Deprivation or suspension of any civil rights for past conduct is punishment for such conduct.
3. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed

* 24 Howard, 299. † 1 Wallace, 83.

a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties.

4. These bills, though generally directed against individuals by name, may be directed against a whole class, and they may inflict punishment absolutely, or may inflict it conditionally.
5. The clauses of the second article of the constitution of Missouri (set forth at length in the statement of the case, *infra*, pp. 279–281), which require priests and clergymen, in order that they may continue in the exercise of their professions, and be allowed to preach and teach, to take and subscribe an oath that they have not committed certain designated acts, some of which were at the time offences with heavy penalties attached, and some of which were at the time acts innocent in themselves, constitute a bill of attainder within the meaning of the provision in the Federal Constitution prohibiting the States from passing bills of that character.
6. These clauses presume that the priests and clergymen are guilty of the acts specified, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath: they assume the guilt and adjudge the punishment conditionally.
7. There is no practical difference between assuming the guilt and declaring it. The deprivation is effected with equal certainty in the one case as in the other. The legal result is the same, on the principle that what cannot be done directly cannot be done indirectly.
8. The prohibition of the Constitution was intended to secure the rights of the citizen against deprivation for past conduct by legislative enactment, under any form, however disguised.
9. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.
10. The clauses of the second article of the constitution of Missouri, already referred to, in depriving priests and clergymen of the right to preach and teach, impose a penalty for some acts which were innocent at the time they were committed, and increase the penalty prescribed for such of the acts specified as at the time constituted public offences, and in both particulars violate the provision of the Federal Constitution prohibiting the passage by the States of an *ex post facto* law. They further violate that provision in altering the rules of evidence with respect to the proof of the acts specified—thus in assuming the guilt instead of the innocence of the parties; in requiring them to establish their innocence, instead of requiring the government to prove their guilt; and in declaring that their innocence can be shown only in one way, by an expurgatory oath.
11. Although the prohibition of the Constitution to pass an *ex post facto* law is aimed at criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal.

Statement of the case.

IN January, 1865, a convention of representatives of the people of Missouri assembled at St. Louis, for the purpose of amending the constitution of the State. The representatives had been elected in November, 1864. In April, 1865, the present constitution—amended and revised from the previous one—was adopted by the convention; and in June, 1865, by a vote of the people. The following are the third, sixth, seventh, ninth, and fourteenth sections of the second article of the constitution:

SEC. 3. At any election held by the people under this Constitution, or in pursuance of any law of this State, or under any ordinance or by-law of any municipal corporation, no person shall be deemed a qualified voter, who *has ever been in armed hostility to the United States, or to the lawful authorities thereof*, or to the government of this State; or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; or has ever, in any manner, adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending within their lines, money, goods, letters, or information; or has ever disloyally held communication with such enemies; or has ever advised or aided any person to enter the service of such enemies; *or has ever, by act or word, manifested his adherence to the cause* of such enemies, or his *desire for their triumph* over the arms of the United States, or *his sympathy* with those engaged in exciting or carrying on rebellion against the United States; or has ever, except under overpowering compulsion, submitted to the authority, or been in the service, of the so-called "Confederate States of America;" or has ever left this State, and gone within the lines of the armies of the so-called "Confederate States of America," with the purpose of adhering to said States or armies; or has ever been a member of, or connected with, any order, society, or organization, inimical to the government of the United States, or to the government of this State; or has ever been engaged in guerilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as "bushwhacking;" or *has ever knowingly and willingly harbored, aided, or countenanced any person* so engaged; or *has ever come into or left this State, for the purpose of avoiding enrolment for or draft*

into the military service of the United States; or has ever, with a view to avoid enrolment in the militia of this State, or to escape the performance of duty therein, or for any other purpose, enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or as a southern sympathizer, or *in any other terms indicating his disaffection to the Government of the United States* in its contest with rebellion, or his sympathy with those engaged in such rebellion; or, having ever voted at any election by the people in this State, or in any other of the United States, or in any of their Territories, or held office in this State, or in any other of the United States, or in any of their Territories, or under the United States, shall thereafter have sought or received, under claim of alienage, the protection of any foreign government, through any consul or other officer thereof, in order to secure exemption from military duty in the militia of this State, or in the army of the United States: *nor shall any such person be capable of holding in this State any office of honor, trust, or profit, under its authority; or of being an officer, councilman, director, trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school; or of holding any real estate or other property in trust for the use of any church, religious society, or congregation.* But the foregoing provisions, in relation to acts done against the United States, shall not apply to any person not a citizen thereof, who shall have committed such acts while in the service of some foreign country at war with the United States, and who has, since such acts, been naturalized, or may hereafter be naturalized, under the laws of the United States; and the oath of loyalty hereinafter prescribed, when taken by any such person, shall be considered as taken in such sense.

SEC. 6. The oath to be taken as aforesaid shall be known as the Oath of Loyalty, and shall be in the following terms:

"I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme

law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me.'

SEC. 7. Within sixty days after this Constitution takes effect, every person in this State holding any office of honor, trust, or profit, under the Constitution or laws thereof, or under any municipal corporation, or any of the other offices, positions, or trusts, mentioned in the third section of this Article, shall take and subscribe the said oath. If any officer or person referred to in this section shall fail to comply with the requirements thereof, his office, position, or trust, shall, *ipso facto*, become vacant, and the vacancy shall be filled according to the law governing the case.

SEC. 9. No person shall assume the duties of any state, county, city, town, or other office, to which he may be appointed, otherwise than by a vote of the people; nor shall any person, after the expiration of sixty days after this Constitution takes effect, be permitted to practise as an attorney or counsellor at law; nor, after that time, shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath.

SEC. 14. Whoever shall, after the times limited in the seventh and ninth sections of this Article, hold or exercise any of the offices, positions, trusts, professions, or functions therein specified, without having taken, subscribed, and filed said oath of loyalty, shall, on conviction thereof, be punished by fine, not less than five hundred dollars, or by imprisonment in the county jail not less than six months, or by both such fine and imprisonment; and whoever shall take said oath falsely, by swearing or by affirmation, shall, on conviction thereof, be adjudged guilty of perjury, and be punished by imprisonment in the penitentiary not less than two years.

In September, A.D. 1865, after the adoption of this constitution, the Reverend Mr. Cummings, a priest of the Roman

Catholic Church, was indicted and convicted in the Circuit Court of Pike County, in the State of Missouri, of the crime of teaching and preaching in that month, as a priest and minister of that religious denomination, without having first taken the oath prescribed by the constitution of the State; and was sentenced to pay a fine of five hundred dollars and to be committed to jail until said fine and costs of suit were paid.

On appeal to the Supreme Court of the State, the judgment was affirmed; and the case was brought to this court on writ of error, under the twenty-fifth section of the Judiciary Act.

Mr. David Dudley Field, for Mr. Cummings, plaintiff in error:

My argument will first be directed to that part of the oath which affirms that the person taking it has never "*been in armed hostility to* the United States, or to the lawful authorities thereof, or to *the government of this State;*" : . . and has never "*given aid, comfort, countenance, or support to persons engaged in any such hostility;*" . . . and has never "*been a member of or connected with any order, society, or organization inimical* to the government of the United States, or *to the government of this State.*" If the imposition of this is repugnant to the Constitution or laws of the United States, the whole oath must fall; for all parts of it must stand or fall together. Mr. Cummings was convicted, because he had not taken the oath, as a whole. If there be any part of it which he was not bound to take, his conviction was illegal. The oath is not administered by portions, and there is no authority so to administer it.

My first position is, that this provision of the constitution of Missouri is repugnant to the Constitution and laws of the United States; because it requires or countenances disloyalty to the United States.

Stripping the case of everything not immediately pertaining to the first position, the oath required may be considered as if it contained only these words:

"I hereby declare, on oath, that I have never been in armed

hostility to the government of the State of Missouri, nor given aid, comfort, countenance, or support to persons engaged in any such hostility, and have never been a member of or connected with any organization inimical to the government of this State."

This is not an oath of loyalty to the United States. The government of Missouri has been, in fact, hostile to the United States. This is matter of history. Being in armed hostility to this hostile State government was an act of loyalty to the United States: an act not to be punished, but to be rewarded.

The loyal citizens of the State were obliged to array themselves against its government; they did so; they took up arms against it; they seized its camp and overthrew its forces. Had it not been for this act of hostility the State might have been drawn into the abyss of secession. It was, therefore, an act which was not only lawful but which was required of the citizen by his allegiance to the United States.

The Constitution and laws of the United States require allegiance and active support from every citizen, whatever may be the attitude of the State government. The difference between the Constitution and the Confederation consists in this, chiefly, that under the Constitution the United States act directly upon the citizen, and not upon the State. What the United States lawfully require must be done, though it be the seizure of the State capitol. The State of Missouri could not subject the plaintiff in error to any loss or inconvenience for giving, in 1861, a cup of coffee to the soldiers who under General Lyon marched out to St. Louis to take Camp Jackson.

Let us consider, *in the second place*, the tendency of this oath, in its relation to *possible* occurrences. It certainly is possible for the government of a State to be hostile to the United States. The governments of the eleven States lately in rebellion were so. If the legislature of South Carolina were to pass a law excluding from the pulpit and the offices of religious teachers every person who has been, at any time during the late war, "connected with any organization *in-*

imical to the government" of South Carolina, that law would be held disloyal and unconstitutional. Suppose the legislature of South Carolina were to go further, and enact that no person, white or black, should ever vote in that State, who, during the war, gave aid, comfort, or countenance to persons engaged in armed hostility to the government of South Carolina, would not every lawyer pronounce such a law utterly void?

If such an oath were required in Tennessee, the present President of the United States could not take it, and would be disqualified. If it were required in Virginia, more than one of our generals and admirals would be disqualified. And so of thousands of other citizens of the States lately in rebellion, who fought in the Union ranks, and opposed the governments of their own States.

There may be collisions between the Federal and the State governments, not breaking out, as the last has done, into flagrant war. A State government may attempt to resist the execution of a judgment of a Federal court; and the President may be obliged to call out the militia to assist the marshal. In such event, every man in the ranks will be in armed hostility to the government of the State. But the State cannot make him suffer for it.

This results from the rule of the Constitution, that the instrument itself, and the laws made in pursuance of it, are the supreme law of the land; and whatever obstructs or impairs, or tends to obstruct or impair, their free and full operation is unconstitutional and void.

The second position which I take is, that the provision imposing this oath as a condition of continuing to preach or teach as a minister of the Gospel, is repugnant to that part of the tenth section of the first article of the Constitution of the United States which prohibits the States from passing "any bill of attainder" or "*ex post facto* law."

Here, again, let us take a particular part of the oath, and refer to so much as affirms that the person taking it has never, "by act or word, manifested his . . . sympathy with

those . . . engaged in . . . carrying on rebellion against the United States." Making a simple sentence of this portion, it would read thus:

"I declare, on oath, that I have never, by act or word, manifested my sympathy with those engaged in rebellion against the United States."

It may be assumed that previous to the adoption of this Constitution it had not been declared punishable or illegal to manifest, by act or word, sympathy with those who were drawn into the Rebellion. It would be strange, indeed, if a minister of the Gospel, whose sympathies are with all the children of men—the good and the sinful, the happy and the sorrowing—might not manifest such sympathy by an act of charity or a word of consolation. We will start, then, with the assumption that the act which the plaintiff in error is to affirm that he has not done was at that time lawful to be done.

Test oaths, in general, have been held odious in modern ages, for two reasons: one, because they were inquisitorial; and the other, because they were used as instruments of proscription and cruelty. In both respects they are contrary to the spirit, at least, of our institutions, and are indefensible, except when applied to matters outside of the domain of *rights*, and when *prospective* in their operation. Whatever the people may give or withhold at will, they may have a constitutional right to burden with any condition they please. This is at once the origin and extent of the rule.

When applied to *past* acts, another principle interposes its shield; that is, that no person can justly be made to accuse himself. This is incorporated in the fifth amendment, in the following words:

"No person . . . shall be compelled, in any criminal case, to be a witness against himself."

And although this prohibition is in terms applied to criminal cases, it cannot be evaded by making that civil in form which is essentially criminal in character.

Retrospective test oaths, that is to say, oaths that the per-

sons taking them have not theretofore done certain things, are almost unknown.

Among the constitutional guarantees against the abuse of *Federal* power thrown around the American citizen, are these three: First, he cannot be punished till judicially tried; second, he cannot be tried for an act innocent when committed; and, third, when tried he cannot be made to bear witness against himself.

Two of these guarantees, and the last two, are set also against the abuse of *State* power.

The prohibition to pass an *ex post facto* law is, in the sense of the Constitution, a prohibition to pass any law which "renders an act punishable in a manner in which it was not punishable when it was committed." The question in the present case, therefore, becomes simply this: Is it a punishment to deprive a Christian minister of the liberty of preaching and teaching his faith? What is punishment? The infliction of pain or privation. To inflict the penalty of death, is to inflict pain and deprive of life. To inflict the penalty of imprisonment, is to deprive of liberty. To impose a fine, is to deprive of property. To deprive of any natural right, is also to punish. And so is it punishment to deprive of a privilege.

Depriving Mr. Cummings of the right or privilege, whichever it may be called, of preaching and teaching as a Christian minister, which he had theretofore enjoyed, and of acting as a professor or teacher in a school or educational institution, was in effect a punishment.

It is not necessary to inquire whether it was intended as a punishment. If the legislature may punish a citizen, by deprivation of office or place, on the ground that his continuing to hold it would be dangerous to the State, then every punishment, by deprivation of political or civil rights, is taken out of the category of prohibited legislation. Congress and the State legislatures—for in this respect they lie under the same prohibition—can pass retroactive laws at will, depriving the citizen of everything but his life, liberty, and accumulated capital.

The imposition of this oath was, however, *intended* as a punishment. This is evident from its history and its circumstances. It is patent to all the world that the object of the exclusion was to affect the person, and not the profession. Mr. Cummings may possibly, at some moment during the last five years, have manifested, by act or word, his sympathy with those engaged in carrying on rebellion against the United States; he may have given alms to the wounded rebel prisoners lying in our hospitals, or he may have spoken to them words of consolation; but no reason can be assigned, from all that, why he should not solemnize marriage or teach the ten commandments; nor can any man arrive at the belief that the convention which devised this constitution had any such notion.

Let us turn now to the other prohibition, that against passing any "bill of attainder." This expression is generic, and includes not only legislative acts to punish for felonies, but every legislative act which inflicts punishment without a judicial trial. If the offence be less than felony, the act is usually called a bill of pains and penalties.

It is not necessary that the persons to be affected by a bill of attainder should be named in the bill. The attainder passed in the 28th year of Henry VIII, against the Earl of Kildare and others (chap. 18, A. D. 1536), enacted that "all such persons which be, or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said late earl, &c., in his or their false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged, and convicted of high treason."

It is therefore certain, that if Mr. Cummings had been by name designated in the constitution of Missouri, and thereby declared to be deprived of his right to preach as a minister of religion, or to teach in a seminary of learning, for the reason that he had done some of the acts mentioned in the oath, such an attempt would have been in contravention of the prohibition against passing a bill of attainder; and it is equally certain, that if he had been thereunder judicially

convicted for doing the same things, being not punishable when done, the conviction would have been in contravention of the other prohibition against passing an *ex post facto* law.

Does it make any difference that these results are effected by means of an oath, or its tender and refusal? There is only this difference, that these means are more odious than the other. The legal result must be the same, if there is any force in the maxim, that what cannot be done directly cannot be done indirectly; or as Coke has it, in the 29th chapter of his Commentary upon Magna Charta, "*Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.*"

The constitutional prohibition was intended to protect every man's rights against that kind of legislation which seeks either to inflict a penalty without a trial or to inflict a new penalty for an old matter. Of what avail will be the prohibition, if it can be evaded by changing a few forms? It is unquestionably beyond the competency of the State of Missouri, by any legislation, organic or statutory, to enact in so many words, that if Mr. Cummings on some occasion, before it was made punishable, manifested by an act or a word sympathy with the rebels, therefore he shall, upon trial and conviction thereof, be deprived of the right (or privilege) which he has long enjoyed, of preaching and teaching as a Christian minister. It must be equally incompetent to enact, that all those Christian ministers, without naming them, who thus acted, shall be thus deprived. And this is because it is prohibited to the State to pass an *ex post facto* law. It is also unquestionably beyond the competency of the State, to enact in so many words, that because Mr. Cummings, on some occasion, after it was made punishable, manifested such sympathy, therefore he shall, without trial and conviction thereof, be deprived of his profession. It must be equally incompetent to enact that all those Christian ministers who have thus acted shall be thus deprived. And this because it is prohibited to the State to pass a bill of attainder.

It does not help this kind of legislation that its taking effect was made to depend on the neglect or refusal to take a prescribed oath; nor help it, to declare that the omission to take the oath is deemed a confession of guilt. If Mr. Cummings had even admitted in the presence of the convention his alleged complicity, that would not have dispensed with a judicial trial.

The legal positions taken on the part of Mr. Cummings may be thus restated. He is punished by deprivation of his profession, for an act not punishable when it was committed, and by a legislative instead of a judicial proceeding. If this is held to be constitutional because it is not done directly, but indirectly, through the tender and refusal of an oath, so contrived as to imply, if declined, a confession of having committed the act, then the prohibition may be evaded at pleasure. You cannot imagine an instance of oppression, that the Constitution was designed to prevent, which may not be effected by this means. Suppose the case of a man tried for treason, and acquitted by a jury. The legislature may nevertheless enact, that if the person acquitted by a jury does not take an oath that he is innocent, he shall be deprived of political and civil rights or privileges. Suppose that the legislature of New York were to pass an act disqualifying from preaching the Gospel, or healing the sick, or practising at the bar, all who during the last year were "connected with any organization inimical" to the administration of the State government. Such an act would of course be adjudged inconsistent with the Federal Constitution. But suppose, instead of passing the law in this form, it should be in the form of requiring an oath from every person desiring to preach the Gospel, or to heal the sick, or practise at the bar, that he had not been connected with such an organization, would that make the case any better? You can punish in two ways: you can charge with the alleged crime, and proving it, punish for it; or you can require the party to purge himself on oath; and if he refuses, punish him by exclusion from a right, privilege, or employment.

Mr. Montgomery Blair filed a brief, on the same side, and after citing several authorities, and enforcing some of the arguments of Mr. Field, thus referred especially to the opinions of Alexander Hamilton.

Mr. John C. Hamilton, in his "History of the Republic of the United States,"* says:

"The animosity natural to the combatants in a civil conflict, the enormities committed by the Tories, when the scale of war seemed to incline in their favor, or where they could continue their molestations with impunity; the inroads and depredations which they made on private property and on the persons of non-combatants, and the harsh and cruel councils of which they were too often the authors, appeared to place them beyond the pale of humanity. This was merely the popular feeling.

"In the progress of the conflict, and particularly in its earliest periods, *attainder* and confiscation had been resorted to generally . . . as a means of war; but it was a fact important to the history of the revolting colonies, that acts prescribing penalties usually offered to the persons against whom they were directed the option of avoiding them by acknowledging their allegiance to the existing government."

But there were exceptions to this wise policy. In New York, especially, there was a formidable party who indulged the worst feelings and went to the greatest extremes. The historian of the Republic thus narrates the matter:

"Civil discord," says this author, "striking at the root of each social relation, furnished pretexts for the indulgence of malignant passions; and the public good, that oft abused pretext, was interposed as a shield to cover offences which there were no laws to restrain. The frequency of abuse created a party interested in its continuance and exemption from punishment, which, at last, became so strong that it rendered the legislature of the State subservient to its views, and induced the enactment of laws *attainting* almost every individual whose connections subjected him to suspicion, who had been quiescent, or whose

* Vol. 3, p. 24.

possessions were large enough to promise a reward to this criminal cupidity."

"Two bills followed. One was entitled, 'An act declaring a certain *description of persons* without the protection of the laws, and for other purposes therein mentioned.' On its being considered, a member, a violent partisan, . . . moved an amendment prescribing a *test oath*, which was incorporated in the act. It disfranchised the loyalists forever. The Council of Revision rejected this violent bill, on the ground that the 'voluntary remaining in a country overrun by the enemy,' an act perfectly innocent, was made penal, and was retrospective, contrary to the received opinions of all civilized nations, and even the known principles of common justice, and was highly derogatory to the honor of the State, and totally inconsistent with the public good."

The act nevertheless was passed. In regard to the test oath, General Hamilton said:

"A share in the sovereignty of the State which is exercised by the citizens at large in voting at the elections, is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law. It is that right by which we exist, as a free people, and it will certainly therefore never be admitted that less ceremony ought to be used in divesting any citizen of that right than in depriving him of his property. Such a doctrine would ill suit the principles of the Revolution which taught the inhabitants of this country to risk their lives and fortunes in asserting their liberty, or, in other words, their right to a share in the government. Let me caution against precedents which may in their consequences render our title to this great privilege precarious."

General Hamilton further remarks:

"The advocates of the bill pretend to appeal to the spirit of Whigism, while they endeavored to put in motion all the furious and dark passions of the human mind. The spirit of Whigism is generous, humane, beneficent, and just. These men inculcate revenge, cruelty, persecution, and perfidy. The spirit of Whigism cherished legal liberty, holds the rights of every individual sacred, condemns or punishes no man without regu-

lar trial and conviction of some crime declared by antecedent laws, reprobates equally the punishment of the citizen by arbitrary acts of the legislature as by the lawless combinations of unauthorized individuals, while these men are the advocates for *expelling* a large number of their fellow-citizens, unheard, untried, or, if they cannot effect this, they are for disfranchising them in the face of the Constitution, without the judgment of their peers and contrary to the law of the land. . . . Nothing is more common, than for a free people in times of heat and violence to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of *disfranchisement*, *disqualification*, and *punishments* by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure, by general descriptions, it may soon confine all the voters to a small number of partisans, and establish an aristocracy or oligarchy. If it may banish at discretion all those whom particular circumstances render obnoxious, without *hearing or trial*, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense. . . . The people are sure to be losers in the event, whenever they suffer a departure from the rules of general and equal justice, or from the true principles of universal liberty."

There is another sentiment of the great statesman and lawgiver which may be deemed not inappropriate to the present unhappy times. He says:

"There is a bigotry in politics as well as in religion, equally pernicious to both. The zealots of either description are ignorant of the advantage of a spirit of toleration. It is remarkable, though not extraordinary, that those characters throughout the States who have been principally instrumental in the Revolution are the most opposed to persecuting measures. Were it proper, I might trace the truth of these remarks from that character who has been THE FIRST in conspicuousness, through the several gradations of those, with very few exceptions, who either in the civil or military line, have borne a distinguished part in the war."

Mr. G. P. Strong, contra, for the State, defendant in error.

I. The separate States were originally possessed of all the attributes of sovereignty, and these attributes remain with them, except so far as the people may have parted with them in forming the Federal Constitution.*

The author of the Federalist, No. 45, says:

"The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

II. Among the rights reserved to the States which may be considered as established upon principle, and by unvarying usage beyond question or dispute, is the exclusive right of each State to determine the qualification of voters and office-holders, and the terms and conditions upon which members of the political body may exercise their various callings and pursuits within its jurisdiction. Authorities already cited establish this proposition; so, also, do others.†

III. The provisions of the second article of the Constitution of Missouri come within the range of these reserved rights, and are neither "bills of attainder," or of pains and penalties, nor "*ex post facto* laws," nor "laws impairing the obligation of contracts." They are designed to regulate the "municipal affairs" of the State, that is, to prescribe who shall be voters, who shall hold office, who shall exercise the profession of the law, and who shall mould the character of the people by becoming their public teachers.

Bills of pains and penalties, and *ex post facto* laws, are such as relate exclusively to crimes and their punishments.‡

* Declaration of Independence: Art. 2, Articles of Confederation; Art. 10, Amendments to the Constitution of the United States. Federalist, No. 45, p. 216, Masters, Smith & Co.'s edit. of 1857. Calder *v.* Bull, 3 Dallas, 386; City of New York *v.* Miln, 11 Peters, 102, 139.

† Federalist, No. 45; Butler *v.* Pennsylvania, 10 Howard, 415; City of New York *v.* Miln, 11 Peters, 102, 139; In re Oliver, Lee & Co.'s Bank, 21 New York, 9.

‡ 1 Blackstone's Commentaries, 46; Sewall *v.* Lee, 9 Massachusetts, 367, citing "Conspirator's Bill;" 2 Woodeson, 41, p. 621; Chase, J., in Calder

The true interpretation of these laws by our own courts is settled by numerous cases in addition to those already cited.*

Not one of these examples of bills of pains and penalties, or *ex post facto* laws, bears any resemblance to the constitutional provisions which the court is now called to pass upon. They were, in terms, acts defining and punishing crimes. They designated the persons to be affected by them, and did not leave it *optional* whether they would suffer the penalty or not.

IV. Every private calling is subject to such regulations as the State may see fit to impose. The privilege of appearing in courts as attorneys-at-law, and the privilege of exercising the functions of a public teacher of the people, have always been the subjects of legislation, and may be withheld or conferred, as may best subserve the public welfare. Private rights have always been held subordinate to the public good.

Even the freedom of religious opinion, and the rights of conscience which we so highly prize, are secured to us by the State constitutions, and find no protection in the Constitution of the United States.

If any State were so unwise as to establish a *State religion*, and require every priest and preacher to be licensed before he attempted to preach or teach, there is no clause in the Federal Constitution that would authorize this court to pronounce the act unconstitutional or void.†

---

v. Bull, 3 Dallas, 390, 391; Paterson, J., Id. 397; Carpenter *v.* Commonwealth of Pennsylvania, 17 Howard, 456, 463; The Earl of Strafford's Case, 3 Howell's State Trials, 1515; Sir John Fenwick's Case, 7 and 8 Wm. III, ch. 3; Bishop of Rochester's Case, 9 Geo. I, ch. 17.

* Ross's Case, 2 Pickering, 165; Rand's Case, 9 Grattan, 738; Boston *v.* Cummins, 16 Georgia, 102; Charles River Bridge *v.* Warren Bridge, 11 Peters, 420.

† Austin *v.* The State, 10 Missouri, 591; Simmons *v.* The State, 12 Id. 268; State *v.* Ewing, 17 Id. 515; The State of Mississippi *v.* Smedes & Marshall, 26 Mississippi, 47; The State *v.* Dews, R. M. Charlton, 397; Coffin *v.* The State, 7 Indiana, 157, 172; Conner *v.* City of New York, 2 Sandford, 355; Same case, 1 Selden, 285; Benford *v.* Gibson, 45 Ala. 521; West Feliciana Railroad Co. *v.* Johnson, 5 Howard's Mississippi, 277.

V. But we are told that this is not an oath of loyalty to the government of the United States, because it requires a declaration that the party has not taken up arms against the government of the State.

The Constitution of the United States is a part of the government of the State. It is as much the Constitution of the people of Missouri as the State constitution. Those who defended the one defended the other. The State government was never hostile to the Federal government. The hostility of Governor Jackson was individual and personal, and was intended to subvert both State and Federal governments.

Mr. Hamilton says:* "We consider the State governments and the National government, as they truly are, in the light of kindred systems, and as parts of one whole."

Chief Justice McKean† also says: "The government of the United States forms a part of the government of each State. These (the State and National) form *one complete* government."

Mr. Jefferson,‡ speaking of the State and Federal governments, says: "They are coördinate departments of one simple and integral whole."

Mr. J. B. Henderson, on the same side, for the State, defendant in error:

Do the provisions of the second article of the Missouri constitution conflict with the Constitution of the United States? The acts objected to are not acts of a State legislature. Even in regard to the constitutionality of such acts it has ever been thought a delicate duty to pass. If doubt exists, that doubt is always given in favor of the law. If ordinary acts of legislation are to be presumed valid, and are to be set aside only when patient examination brings them, beyond doubt, into conflict with the supreme law of the land, how much stronger the presumption in favor of the

* Federalist, No. 82. † 3 Dallas, 473.

‡ Letter to Major Cartwright, June 5, 1824; Jefferson's Works, vol. 4, p. 396.

act of the people themselves in framing such organic laws as they may think demanded by the exigency of the times and necessary to their safety?

The tenth amendment to the Constitution of the United States provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

No question, therefore, can arise as to the power of the people of Missouri to adopt the provisions in question unless they fall within the powers delegated to the United States, or are prohibited to the States by the Federal Constitution. The subject-matter of them is clearly not within the powers delegated to the United States, but belongs to that class of legislation reserved to the States or to the people, and unless it be directly prohibited to the States by some clause or clauses of the Federal Constitution the provisions must be held valid. Among the powers prohibited to the States is one in the tenth section of the first article of the Constitution, which provides "that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." This clause is chiefly relied on to avoid the provisions alluded to in the constitution of Missouri.

It has been decided that bills of pains and penalties, which inflict a milder degree of punishment, are included within bills of attainder, which refer to capital offences. It has been said by an accurate writer* that in cases of bills of attainder, "the legislature assumes judicial magistracy, weighing the enormity of the charge and the proof adduced in support of it, and then deciding the political necessity and moral fitness of the penal judgment." He says these acts, instead of being general, are levelled against the particular delinquent; instead of being permanent they expire, as to their chief and positive effects, with the occasion. Now, do these provisions fall within this definition? *To be obnoxious as bills of attainder, the provisions must operate against some particular delinquent, or specified class of delinquents, and not against*

* Woodeson, Lecture 41.

the whole community. They must not be permanent laws, operating as a rule to control the conduct of the whole community, but must expire upon the infliction of punishment on the individual or individuals named. Before these provisions can be called bills of attainder, it must appear that they criminate the defendant for the commission of some act specified in the third section of the second article of the Constitution; and that they assume to pronounce the punishment for that act. The law itself must assume to convict him.

If any means be left by which the defendant can escape the punishment prescribed in the act, the act cannot be a bill of attainder; for a bill of attainder assumes the guilt and punishes the offender whatever he may do to escape. If the act in question applies as well to the entire community as to him, and operates upon all alike, only prescribing an oath, which may or may not be taken by him and others, as a condition of a future privilege, it is in no sense a bill of attainder.

If any objection really exist against these provisions of the Missouri constitution it is because they are retrospective in their operation. Whether they are *ex post facto* laws is, therefore, the chief question for our examination.

Before proceeding to that examination, an argument of one of the counsel for the plaintiff must be noticed. He errs not perhaps in logical deduction, but in the statement of premises.

He argues thus: Mr. Cummings had the right to preach. A test oath is prescribed for a person following his profession which he cannot truthfully take, hence he has to forfeit his right to preach.

This is called a punishment, for the acts of which he is guilty, and of which he cannot purge himself by oath. The punishment, then, consists in the forfeiture of this assumed right to preach the Gospel. Of course, punishment must be impending to make the objection apply. The real objection to an *ex post facto* law is not that it declares a past innocent action a crime, but in the fact that it undertakes, after so

declaring, to punish it. The Constitution of the United States steps in to prevent the punishment, not the passage of the act. Now, if the supposed forfeiture pronounced by the act is no punishment at all in the eye of the law, the objection ceases.

What is this thing we call punishment for crime in this country? Punishment under our institutions, legally considered, must affect person or property. It must take the "life" of an individual, impose restraints on his "liberty," or deprive him of his "property." Common sense teaches us that no man is punished by the loss of something that never was his absolute property. If I retake from my neighbor what I had granted him during my pleasure, I inflict no loss on him. He loses nothing. I gain nothing. The thing may be of value, but it is mine. If the thing taken has no value, although he may not have received it of me, he does not suffer. Punishment is to inflict suffering. This view of the subject is strengthened by the language of the fifth article of Amendments to the Federal Constitution, and by similar language in each State constitution. This article declares, first, that prosecutions, except in particular cases, shall be commenced by presentment or indictment of a grand jury. Coming to the trial, it is next provided, that no man shall be twice tried for the same offence, nor compelled to be a witness against himself, and then, in the same connection, it provides that he shall not "be deprived of his life, liberty, or property, without due process of law." The latter part of the clause evidently refers to the punishment of crime. *To punish one, then, is to deprive him of life, liberty, or property. To take from him anything less than these, is no punishment at all.* These are natural rights, and to take them away is what we properly call punishment. All other rights are conventional, and may at any time be resumed by the public, in the most summary way, without any regard to due process of law. Hence, public offices have always been taken away from the incumbents, by the sovereign act of the people, without consulting the incumbents, without informing them, without hearing them in their defence, and yet

nobody ever supposed this to be a punishment of the incumbents. It is not a punishment, because it deprives them of no property whatever. The public, it is true, had given them a trust, but the public had created that trust for their own purposes, and the public can resume it whenever necessity or convenience require it. And the public alone can judge of that necessity or convenience.

Let us now proceed to the examination of *ex post facto* laws.

Story, J.,* defines an *ex post facto* law to be one "whereby an act is declared a crime, and made punishable as such, which was not a crime when done: or whereby the act, if a crime, is aggravated in enormity or punishment, or whereby different or less evidence is required to convict an offender than was required when the act was committed." This court, in the case of *Fletcher* v. *Peck*, said:

"An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed."

In *Watson et al.* v. *Mercer*,† this court said:

"The phrase *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed."

Each and every act enumerated in the third section may have been committed, and yet no provision of this State constitution attempts to punish it. Indeed, it makes no provision to punish even in the future the commission of such acts as are therein specified. The acts enumerated are not denounced in the constitution as crimes at all, nor is any punishment whatever attached to their commission. How, then, is this test oath an *ex post facto* law? It does not operate on the past. If one stands on his past record, however guilty he may be, this provision cannot touch him. If

* Commentaries on the Constitution. † 8 Peters, 110.

he is ever punished for what he has done, it must be according to some previous existing law, and not under this act. This act does not deal with the past. It looks only to the future. If it refers to the past at all, it is only for the purpose of ascertaining moral character and fitness for the discharge of high civil duties, which give credit and influence in the community, and can never be safely intrusted in the hands of base or incompetent men.

But to proceed with the definition. Justice Washington, delivering the opinion of the court in *Ogden* v. *Saunders*,* speaking of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, said: "The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character."

In *Calder* v. *Bull*, the first great case involving a definition of the term *ex post facto*, in this court, Chase, J., delivered the opinion of the court, and gave a definition which has been ever since substantially adopted as the law. He said, it is:

"*First.* Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

"*Second.* Every law that aggravates a crime and makes it greater than it was when committed.

"*Third.* Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

"*Fourth.* Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offence in order to convict the offender."

Does this provision of the State constitution assume to declare any act already done by the defendants, at any time, to be criminal? Is it, in any sense, a criminal law to operate upon the past? If it had declared that previous acts of practising law, innocent as they were when done, should

* 12 Wheaton, 267.

now be offences, and might be punished in the courts, the provision could not, and should not, be enforced. If the provision had declared that any person guilty of a previous expression of sympathy with the public enemy, or of previously enrolling himself as disloyal, to evade military service in the Union forces, or of seeking foreign protection as an alien against military service, might now be indicted and punished therefor, by fine and imprisonment, or both, I could well understand an argument against its validity. But this provision does no such thing. It declares no past act of the defendant to be an offence, nor does it prescribe for any such act any forfeiture whatever, much less the deprivation of a property right. What is a criminal law? It defines an offence, and fixes the punishment, and the mode of inflicting it. If it stamps as crime an innocent past action it is no law. But if it looks only to the future, and gives the choice to the citizen to violate it or comply with it, it is a valid law, at least so far as this prohibition is concerned. This act, it is true, defines an offence, but the offence defined is one that cannot be committed before the expiration of sixty days after the act shall have been adopted. No man is compelled to be guilty. That is not the case under an *ex post facto* law. In such cases there is no option for the victim. The act to be punished is done, and cannot be undone.

A punishment is also denounced in the act, but that punishment is to be applied only to acts of the future. This act, then, does not make a crime of an action which was innocent when done, and proceed to punish it, and it cannot in that respect be classed as an *ex post facto* law.

If one be guilty of treason, of course he cannot in such case take the oath, and must therefore stand excluded. It is not a new or additional penalty or forfeiture for the crime of treason. It was not so intended. In its true purpose, such an act is not a criminal law at all, much less an *ex post facto* law. It is an act to fix the qualifications of voters, and applies to the innocent as well as to the guilty. If a man, having long enjoyed the franchise, be excluded by the sov-

ereign act of the people, unless he will take an oath that he can read and write, is it to be construed an act to punish ignorance, or an act to preserve the purity and usefulness of the ballot-box? If an act were passed vacating the offices of all sheriffs who had not practised law for five years under a license, before their election, is the act void?

But we are told that this act alters the legal rules of evidence, and receives less testimony than was necessary at the time the act was committed to convict the offender. If perjury be committed, and at the time of its commission two witnesses are required to convict, we can understand that a subsequent act authorizing a conviction on the testimony of one witness is not valid. We can well understand that a law which makes testimony competent, that was not competent at the time of the act, is void. But the law will not be declared void until its obnoxious provisions are attempted to be enforced in some specific case, that is, until a case arises. The difficulty here is that plaintiffs in error insist that they are on trial for the offences, or rather the acts of disloyalty, named in the third section. But they are not now on trial, for no conviction or judgment therefor can follow these proceedings. The taking of the oath is not an acquittal of the offences or acts enumerated. The refusal to take it is not a conviction, nor does it tend to a conviction. This act has nothing to do with the trial or conviction of the offender for past actions; it fixes no rule or rules of evidence by which a conviction may be had more easily, for there can be no trial or conviction at all under the act for anything previously done.

The Constitution provides that no person "shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." It is insisted that the provisions of the Missouri law conflict with this clause, which clothes in language a great principle of national right. If, on the trial of the case of Mr. Cummings, he had been compelled to testify against himself, there would be some ground for the complaint. We have already attempted to show that he is not

deprived of life, liberty, or property under this law. He is surely not deprived of life or liberty, and the right to pursue his profession is not such an absolute right of property as to be above the control and regulation of State law. It is said he is punished without the right of trial "by an impartial jury," and without the right "to be confronted by the witnesses against him;" without the right of "compulsory process for obtaining witnesses" in his favor, and without that other invaluable right, "the assistance of counsel" in his defence. Suppose it were so, what has this court to do with it? These great rights are only secured by the Constitution "in all criminal prosecutions" set on foot by the United States and not in those set on foot by the States. And now, in the present prosecution against Mr. Cummings for violating the act itself, or in any prosecution that may be hereafter instituted against him, or other persons, for such violation, if any of these rights shall be denied them we may say the act is unjust, but that is the end of it. The State may do acts of injustice if it chooses. We must trust something to the States. Mr. Cummings, however, had the right of trial by jury; the right to be confronted with the witnesses against him; the right of process to compel the attendance of his witnesses; and even those beyond the limits of our own country will know that he has had "the assistance of counsel," for he was ably defended in the courts of the State, and they who now defend him are known wherever enlightened jurisprudence itself is known.

Whenever prosecutions arise under these provisions, there will, doubtless, be granted, in Missouri, to the accused, all these guarantees of constitutional liberty. The State cannot deny them to one of its citizens without denying them to all; and to suppose a people so lost to common sense as to deprive themselves, voluntarily, of these great and essential rights, necessary to a condition of freedom, is to suppose them incapable of self-government.

But an objection is also urged which is well calculated to excite interest. The rights of conscience are sacred rights. They are too often confounded, however, with the unre-

strained license to corrupt, from the pulpit, the public taste or the public morals. However this may be, the American people are exceedingly sensitive on the subject of religious freedom; and whenever the people are told, as they have been in this case, that the indefeasible right to worship God according to the dictates of conscience is about to be invaded, the public mind at once arouses itself to repel the invasion. The first article of the amendments to the Constitution is in these words:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The third clause of the sixth article declares that

"No religious test shall ever be required as a qualification to any office or public trust under the United States."

Story, J., commenting on these provisions, says:

"The whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."

The Jew, the infidel, and the Christian are equal only in the national councils. The States may make any discrimination in favor of any sect or denomination of Christians, or in favor of the infidel and against the Christian. North Carolina had the right to exclude the Catholic from public trusts; and other States have the right, so long exercised, to deny ministers of all denominations a place in their legislative halls. Congress cannot establish a national faith; but where are the limitations on the powers of the States to do so? There are none, unless they be found in this provision against bills of attainder and *ex post facto* laws—a provision which, in its present interpretation, saps and withers every right once fondly claimed by the States. In the formation of State constitutions, I have never doubted the power to regulate the modes of worship or prescribe forms for the public observance of religion. Hence it is that the bills of right, to be found in all the State constitutions, attempt to

secure this great right of free and unrestricted worship against the caprice or bigotry of State legislators. But within the limits of the State constitution, when thus framed, the legislature has entire control of the subject.

It is said these oaths are unprecedented. They are, no doubt, extraordinary, perhaps unprecedented; but the provisions themselves are no more extraordinary than the circumstances which called them into existence. These last are not known to all, and indeed are known fully but to few. I must ask the privilege of departing so far from the line of strict legal argument as partially to state them. Such a statement is indispensable truly to understand this case.

The bare recital of these provisions, I am aware, has fallen harshly on the public ear. Loyal men in other States hesitated to justify them, while the disloyal hastened to denounce them. Beyond the limits of Missouri, they, perhaps, have had but few advocates. But beyond those limits, no man knows the terrible ordeal through which her people passed during the late Rebellion. To appreciate their conduct properly, one must have been on the soil of the State, and that alone is not sufficient: he must have been an active participant in the struggle for national life and personal security. The men of Missouri, at an early day in this war, learned to be positive men. They were for, or they were against. When the struggle came, each man took his place. The governor and the legislature were disloyal. A convention called by that legislature, merely to give character to the mockery of secession, proved to be loyal, and refused to submit an ordinance of secession to a pretended vote of the people. Hence came a fierce war of opinion. The first great contest was for political power. Each party saw the absolute necessity of obtaining it. With it, ultimate success might be achieved; without it, success was impossible. In the midst of this controversy, while the issue was yet in doubt, Fort Sumter was attacked, and civil war suddenly broke upon the land. In Missouri, it was a hand-to-hand contest, each party fighting for the possession of power,

and each feeling that expulsion was the penalty of failure. Acts of the grossest treason were committed; but no man could be found who confessed himself present, or who would speak the truth against his neighbor. His silence, however, made him no less earnest. Neighbors and friends of long standing separated and joined hostile forces. Each county had its military camps, and each municipal township its opposing military and political organization. Traitors and spies came from the confederate armies of Arkansas and Texas to organize regiments secretly in the State, and found shelter and food in the houses of the disloyal. Organized armies sprang into existence around us, and joined the advancing hosts, to assist in the work of devastation and death. Some who did not themselves go into open rebellion from prudential reasons, some too old to bear arms, urged others to go, and furnished means and money to equip them. Some acted as spies in their respective neighborhoods, and sent secret information to the enemy, which often sealed the fate of their neighbors. The merchant in his store-room talked treason to his customers; the school teacher instilled its poison into the minds of his pupils; the attorney harangued juries in praise of those whose virtue demanded the great charters of English liberty, and denounced the spirit of this age for its submission to usurpation and tyranny. And even the minister of heaven, forgetting of what world his Master's kingdom was, went forth to perform the part allotted to him in this great work of iniquity.

No man was idle. No man could be idle. Men might be silent, but they were earnest; because life, and things dearer than life, depended on the issue. The whole man, mental and physical, was employed. The whole community was alike employed, and every profession, and every avocation in life was made subservient to the great end,—the success or overthrow of the government. On the day when the delegates to the convention which framed this constitution were elected, General Price, at the head of twenty thousand desperate men from Arkansas, Texas, Louisiana, and Missouri, was sweeping through the State, leaving be-

hind him smouldering ruins and human suffering; and he and they who made this desolate path, were received with shouts of joy and approbation by thousands of citizens, who sought by the ballot, on that day, to give lasting welcome to the invaders.

I have referred to these things to vindicate the people of Missouri against the charges which have been made against them, and to show the reasons and the reasonableness of their action.

Mr. Reverdy Johnson, for the plaintiff in error, Mr. Cummings, in reply:

I. Is the provision in the constitution of Missouri obnoxious to the objection of being *ex post facto?*

Opposing counsel seem to suppose that the clause in the Federal Constitution which would prevent an *ex post facto* law is not applicable to the organic law of a State. They argue that even if a provision such as is contained in the constitution of Missouri would be void in a statute law of the State, yet it is not void when in her constitution.

There is no warrant for the distinction. The ninth section of the first article of the Constitution of the United States restrains Congress from passing any bill of attainder or any *ex post facto* law, and the great men by whom that instrument was framed were so well satisfied that legislation of this description was inconsistent with all good government, that they deemed it necessary to impose the same restriction upon the States; and this they did by providing that "no State"—not *no legislature of a State*, but that "*no State*"—should pass any *ex post facto* law or any bill of attainder. If we consult the contemporaneous construction—and which has ever been received almost as conclusive authority upon its meaning—given it by the Federalist, we will find* that it was not thought necessary to vindicate the Constitution upon the ground that it contained a provision of this description. It was thought sufficient to say that the provision

* Number 44, by Mr. Madison.

was but a declaration of a fundamental principle of free government, a principle without which no such government could long exist, and that it was adopted not because there was any doubt in regard to it upon the part of the convention, or because any doubt was entertained what would be the public opinion in relation to it, but because it was so universally held to be important that it was deemed necessary not only by express constitutional provision to inhibit to Congress the power to pass such laws, but to prohibit the States at any time from doing so either.

It can make no difference, therefore, whether such legislation is found in a constitution or in a law of a State; if it be within the prohibition it is void; and the only question, therefore, is whether the constitution of Missouri, in the particular which is involved in this case, is not liable to the objection of being *ex post facto*.

My brothers of the other side suppose that there is no *punishment* imposed by the constitution of Missouri upon one who refuses to take the oath. They do not mean, surely, no punishment in the general sense of the term; that he whose livelihood depends on his profession is not, in the general acceptation of the term, punished if he is not permitted to pursue it; that he whose business it is, claiming to derive his authority from a higher than any human source, to preach peace on earth, good will to men, is not punished when he is told that he shall do neither; that a man is not punished when he is prevented from teaching his own child (for this oath comprehends that act) the ways which he believes are the only ways that lead to perpetual happiness in the future; cannot teach him what he deems to be man's duty to man and man's duty to God;—without taking an oath which any State from party, political, or religious prejudice, may think proper to prescribe.

A prohibition of the sort here enacted, operating to the extent that it does, is not only punishment but most severe punishment; perhaps the most severe.

And, if it is a punishment in fact, why is it not a punishment that falls within the inhibition of the Constitution?

The inhibition is absolute and as comprehensive as language can make it.

Now what does the constitution of Missouri assume? It assumes that there are persons in the State of Missouri who have been guilty of disloyalty to the United States. Opposing counsel argue that it was of importance to the future welfare of Missouri, when the constitution was adopted, that such a provision as this should be incorporated in her fundamental law. And why? Because, as they assert, there were secret, silent, insidious traitors in her midst; traitors, also, whose hands were red with the blood of loyal citizens. The argument, therefore, as well as the provision itself, assumes that crime has been committed, and that it is important to the State that all who have been guilty of that crime shall forever be excluded from any of the offices or the employments mentioned in the third section of the second article of the constitution. Then it was put there evidently for the *purpose of disfranchising* those who were thus assumed to be guilty. Whether they were guilty or not, and how they were to be punished if that guilt should be established by due course of law, is one question. Whether, if guilty, they could be punished in the way in which they are punished by this constitution is a different question. If they are guilty, and are so to be punished, how that guilt is to be established is a third question.

How was their guilt to be established, according to the requirements of the constitution, if the charge of treason was made against them? By two witnesses. What would be the effect upon an individual if he was convicted? No disfranchisement. Capacity to hold office as far as any positive legal disability was concerned—capacity to appear as attorney—capacity to pursue his religious pursuits; all would remain unaffected.

What does this provision in the constitution of Missouri do? It assumes that it is not sufficient that society is secured by such punishment as the previous law provided. If the court should think proper in its discretion to award the punishment of imprisonment, and the party survives,

he cannot be punished again in any way in the remainder of his life. If he seeks employment afterwards, the question of prior guilt may be held to affect his character; but that found to be fair and he trustworthy, the road to honor and to office may be open to him. This constitution of Missouri says that this is not enough; that the public safety demands that, if he is guilty, he shall be excluded from all offices in that State; not only from all offices, but from all employments; not only from professional employment, but from carrying on the avocation with which, in his own belief, heaven itself has endowed him; not only that, but from being an officer in any municipal or other corporation, although he may own nearly all the stock, and from holding any trust.

Is that not *ex post facto?* The very definition of such a law, which opposing counsel have given upon the authority of this court in the case of *Calder* v. *Bull*, and in the subsequent cases, brings such a provision within it. Even if we were to stop here, any law, and, as has been already shown, any constitution, which imposes a punishment for crime in addition to that which the existing law at the time of its commission imposed, is *ex post facto.*

But that is not all. It not only imposes an additional punishment, but it changes altogether the evidence by which, under the previous law, the crime was to be established. Two witnesses to the same overt act were necessary to prove the offence of treason. This constitution says, in effect, that "it is true that hundreds and thousands in the State of Missouri have been guilty of acts of disloyalty which would subject them to punishment for treason under the existing law; and it is true that they may be punished under that law effectively, provided the government which thinks proper to prosecute them can establish their guilt by such evidence as the constitution demands; but that will not answer our purpose; we cannot accomplish our end in that mode; we not only propose to aggravate the punishment, but we propose to establish the crime by evidence which is now inadmissible for that purpose." And what is that evi-

dence as they themselves present it? "You, Mr. Cummings, desire to preach, to solemnize marriage, to bury the dead, to administer the sacrament of the Eucharist, to console the dying; you shall not do either, unless you will swear that you have not committed the offence: you must purge yourself by your own oath, or, as far as we are concerned, we find you guilty. We believe you are guilty; and if you are guilty, we do not mean that you shall execute your religious functions at all. And we make the fact of your refusing to swear that you are innocent conclusive evidence of your guilt, and punish you accordingly."

Now, Congress has treated an exclusion from the right to hold office as a punishment. The act of the 10th April, 1790, defines and punishes perjury, and for punishment, it is declared that the party shall undergo "imprisonment not exceeding three years, and a fine not exceeding eight hundred dollars; and shall stand in the pillory for one hour, and be *thereafter rendered incapable of giving testimony in any of the courts of the United States until such time as the judgment so given against the said offender shall be reversed.*"* It is plain that to take from him the privilege of being a witness was considered a punishment. By the twenty-first section, the crime defined is that of attempting to corrupt a judge, and as punishment, it is declared that the party "shall be fined and imprisoned, and *shall forever be disqualified to hold any office of honor, trust, or profit under the United States.*" In accordance with the impression that that was not only punishment, but punishment of a very severe nature, we find in the act of July 17, 1862,† "an act to suppress insurrection, to punish treason," &c., passed of course whilst the Rebellion was in full force, this provision:

"That every person guilty of either of the offences described in this act shall be *forever incapable and disqualified to hold any office under the United States.*"

Counsel on the other side maintain that the exclusion of

* 1 Stat. at Large, p. 116, § 18.

† 12 Stat. at Large, pp. 589–590, § 3.

the priest from the right to preach or to teach is not *ex post facto* legislation within the meaning of those terms in the Constitution, because it is not the legal consequence of any crime; something having no connection with the crime. They admit, therefore, that if the punishment can attach itself to the crime, and it be a punishment not known to the laws at the time the crime was committed, it is void. Now, what does the State constitution do? Does it not exclude because of the crime, in consequence of the crime, and only in consequence of the crime? If it does, it is, in the judgment of Missouri, or in the judgment of its constitution, a punishment of the crime just as effectually as if a party was tried upon an indictment and convicted, and the law authorized a party, upon that conviction, to be excluded from the right to practise or to preach. That no proceeding, judicial in its nature, is provided for, can make no difference; a proceeding still more effective is provided. A proceeding by indictment might or might not accomplish the end; the two witnesses required might not be found; the party might, therefore, be acquitted. His guilt might be in his own bosom, and no witness could be found, and, consequently, he would be acquitted. And as its object was to strike at the crime, and remove those who were supposed to be loyal in the State of Missouri from the contamination of the crime or of the criminal, it requires him to swear that he has not committed it, and tells him, "Not swearing, we find you have committed the crime, and will punish you accordingly."

Suppose that, instead of excluding Mr. Cummings from the practice of his calling, it had said that if he did not answer he should be subjected to a pecuniary penalty, a fine, or to imprisonment, both or either; would not that be void because of the restriction? And if so, must not this be held void, provided we agree with Congress in the opinion contained in the two acts already referred to, that exclusion from the right to hold office is "punishment?"

The degree, the extent, the character of the punishment, has nothing to do with the fact of punishment. Admit that Mr. Cummings and all standing in like relation are punished

by this State constitution, and the constitution falls just as absolutely as if, instead of ordaining that persons should be punished by not being permitted to exercise and carry on their occupations, it had said, "if you do not swear to your innocence we infer you to be guilty, and we fine and imprison you." It would be as much in that case, and not more, a consequence of the crime, as it is in this case. And once hold it to be consequential upon the crime, and you bring it within the inhibition, provided the punishment which it does inflict is not the punishment which the law inflicted at the time the crime is alleged to have been committed.

As a member of that Church which claims to have its authority directly through a regular and unbroken apostolic succession from the Author of our religion, Mr. Cummings is found in the enjoyment and practice of all the privileges belonging to the function and of all the sacred rights which are incident to it. The Constitution of the United States, to be sure, so far as the article which proclaims that there shall be no interference with religion is concerned, is not obligatory upon the State of Missouri; but it announces a great principle of American liberty, a principle deeply seated in the American mind, and now almost in the entire mind of the civilized world, that as between a man and his conscience, as relates to his obligations to God, it is not only tyrannical but unchristian to interfere. It is almost inconceivable that in this civilized day the doctrines contained in this constitution should be considered as within the legitimate sphere of human power. "This question," it has been truly said by another clergyman sought to be restrained by this constitution, "is not one merely of loyalty or disloyalty, past, present, or prospective. The issue is whether the Church shall be free or not to exercise her natural and inherent right of calling into, or rejecting from, her ministry whom she pleases; whether yielding to the dictation of the civil power she shall admit those only who, according to its judgment, are fit for the office, or, admitting those to be fit, whether she shall not be free to admit those also who, though

at first not fit, afterwards become so through pardon and forgiveness.

"The question is whether the Church is not as much at liberty and as fully competent nowadays as at the beginning to call in as well the saints as those who were sinners, as well the Baptist and Evangelist as St. Peter and St. Paul, the denier and persecutor of the Redeemer, as well as his presanctified messenger and beloved disciple. With all these questions the State itself has nothing to do. Their decision is the high and unapproachable prerogative of the Church, under the guidance of its Redeemer, who alone is the searcher of hearts, and whose power it is to recall or reject whom he pleases."

My associate, in his opening of the case, has stated that the State government of Missouri was at one time, 1861, hostile to the government of the United States; and that loyal citizens were obliged to take up arms and overthrow it. No doubt the fact must be so admitted. Governor Claiborne Jackson, holding the executive authority of the State under a proper election, and the judiciary and the legislative departments of the same State holding their respective authorities under a proper election, held in pursuance of a constitution then existing and not disputed, were at one time in the full possession of all the sovereignty of the State of Missouri, as far as that sovereignty was delegated by the people to its government. The Representatives of the State elected during the continuance of that constitution were received here. Their Senators were here, chosen by that legislature, and their credentials testified by the then governor. Their courts were in session under the authority of that constitution.

Under the decision in *Luther* v. *Borden*,* the court cannot go beyond these facts for the purpose of ascertaining in what condition, politically, Missouri was, for the purpose of answering the inquiry, what was the government of Missouri in 1861? Then it is plain that this oath calls upon the party

* 7 Howard, 1

to swear that he has been loyal to two governments of Missouri, one of which was directly opposed to the other.

Opposing counsel, indeed, say that the government of Missouri does not mean the government strictly speaking of the State of Missouri, constituted by the people of the State of Missouri; but that the government of Missouri is a compound, according to their view, consisting of the constitution and laws of Missouri and the Constitution and laws of the United States. But the argument is without force. When a law speaks of a State government it does not mean the government of the United States. Nor does it mean to include any authority over the people of a State which the government of the United States may possess by virtue of the Constitution of the United States. It means that political institution created by the people of the State for the government of the people of the State, without any regard at all to the other inquiry, over what subjects the people of that State have a right by government to assume jurisdiction.

If this is so, and it be true that a State government is one government as contradistinguished from all others, and that the government of the United States is another government as contradistinguished from a State government, then an oath which requires a party to swear that he has committed no act of hostility against the State government, and no act of hostility as against the government of the United States, is an oath which, if he has committed acts of hostility against the State government, renders it impossible that he can enjoy the franchise made dependent upon the failure to exercise any acts of hostility. Yet that is this oath.

It is said that what Missouri has done, in regulating the qualifications of those who are to hold office and pursue certain professions, is simply the right to define the qualifications which Missouri, in the exercise of her sovereignty, thinks proper to demand. Is it so? In one sense it is so; but is that the sense in which the provision has been incorporated in the constitution? To prescribe age, property qualifications, or any other qualification that anybody has

an equal opportunity of acquiring, is one thing; to disqualify because of imputed crimes, is quite another thing. The powers of government exerted in the doing of these two things are entirely distinct. In the one, the power to regulate the qualifications for office, or for the pursuit of callings, only is involved; in the other, the power of forfeiture under the power to punish is involved, and those two powers are altogether distinct. The one is the power which belongs to every government to define and punish crime. The other, that which belongs to every free government to provide for the manner in which its agents are to be chosen, and the conditions upon which its citizens may exercise their various callings and pursuits.

Mr. Justice FIELD delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the test oath imposed by the constitution of that State. The plaintiff in error is a priest of the Roman Catholic Church, and was indicted and convicted in one of the circuit courts of the State of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The oath prescribed by the constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts, against which it is directed, constitute offences of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offences in the laws of any State, and some of the acts, under many circumstances, would not even be blameworthy. It requires the affiant to deny not only that he has ever "been in armed hostility to the United States, or to the lawful authorities thereof," but, among other things, that he has ever, "by act or word," manifested his adherence to the cause of the enemies of the United

States, foreign or domestic, or his *desire* for their triumph over the arms of the United States, or his *sympathy* with those engaged in rebellion, or has ever *harbored* or *aided any person* engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever *entered* or *left* the State for the purpose of avoiding enrolment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, *in any terms*, his *disaffection* to the government of the United States in its contest with the Rebellion.

Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

And every person holding, at the time the constitution takes effect, any of the offices, trusts, or positions mentioned, is required, within sixty days thereafter, to take the oath; and, if he fail to comply with this requirement, it is declared that his office, trust, or position shall *ipso facto* become vacant.

No person, after the expiration of the sixty days, is permitted, without taking the oath, "to practice as an attorney or counsellor-at-law, nor after that period can any person be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages."

Fine and imprisonment are prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions, or functions" specified, without having taken the oath; and false swearing or affirmation in taking it is declared to be perjury, punishable by imprisonment in the penitentiary.

The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test oaths, but they were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship. If one has ever expressed sympathy with any who were drawn into the Rebellion, even if the recipients of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels, and is equally debarred from the offices of honor or trust, and the positions and employments specified.

But, as it was observed by the learned counsel who appeared on behalf of the State of Missouri, this court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States. On behalf of Missouri, it is urged that they only prescribe a qualification for holding certain offices, and practising certain callings, and that it is therefore within the power of the State to adopt them. On the other hand, it is contended that they are in conflict with that clause of the Constitution which forbids any State to pass a bill of attainder or an *ex post facto* law.

We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes,

except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

These are general propositions and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success." It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of

the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms —life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statute 9 and 10

William III, chap. 32, if any person educated in or having made a profession of the Christian religion, did, "by writing, printing, teaching, or advised speaking," deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offence rendered incapable to hold any office or place of trust; and for the second he was rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, besides being subjected to three years' imprisonment without bail.*

By statute 1 George I, chap. 13, contempts against the king's title, arising from refusing or neglecting to take certain prescribed oaths, and yet acting in an office or place of trust for which they were required, were punished by incapacity to hold any public office; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of Parliament; and the offender was also subject to a forfeiture of five hundred pounds to any one who would sue for the same.†

"Some punishments," says Blackstone, "consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like."‡

In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection

* 4 Black. 44. † Id. 124. ‡ Id. 377.

of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri constitution being in effect punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement.

The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.

It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher* v. *Peck*,* Mr. Chief Justice Marshall, speaking of such action, uses this language: "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

* 6 Cranch, 137.

"'No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.'"

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.

"Bills of this sort," says Mr. Justice Story, "have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."*

These bills are generally directed against individuals by name; but they may be directed against a whole class. The bill against the Earl of Kildare and others, passed in the reign of Henry VIII,† enacted that "all such persons which be or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said" late earl, and certain other parties, who were named, "in his or their false and traitorous acts and purposes, shall in likewise stand, and be attainted, adjudged, and convicted of high treason;" and that "the same attainder, judgment, and conviction against the said comforters, abettors, partakers, confederates, and adherents, shall be as strong and effectual in the law against them, and every of them, as though they and every of them

* Commentaries, § 1344.

† 28 Henry VIII, chap. 18; 3 Stats. of the Realm, 694.

had been specially, singularly, and particularly named by their proper names and surnames in the said act."

These bills may inflict punishment absolutely, or may inflict it conditionally.

The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be forever banished from the realm; and that if he returned, or was found in England, or in any other of the king's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason; with the proviso, however, that if he surrendered himself before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect.*

"A British act of Parliament," to cite the language of the Supreme Court of Kentucky, "might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury."†

If the clauses of the second article of the constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And,

* Printed in 6 Howell's State Trials, p. 391.

† Gaines v. Buford, 1 Dana, 510.

further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

We proceed to consider the second clause of what Mr. Chief Justice Marshall terms a bill of rights for the people of each State—the clause which inhibits the passage of an *ex post facto* law.

By an *ex post facto* law is meant one which imposes a pun-

ishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

In *Fletcher* v. *Peck*, Mr. Chief Justice Marshall defined an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed." "Such a law," said that eminent judge, "may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

The act to which reference is here made was one passed by the State of Georgia, rescinding a previous act, under which lands had been granted. The rescinding act, annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for a crime, which was not declared such by some previous law rendering him liable to that punishment, the chief justice was of opinion that the rescinding act had the effect of an *ex post facto* law, and was within the constitutional prohibition.

The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced the Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. It was no offence against any law to enter or leave the State of Missouri for the purpose of avoiding enrolment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex*

post facto law—"they impose a punishment for an act not punishable at the time it was committed."

Some of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law—"they impose additional punishment to that prescribed when the act was committed."

And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

The objectionable character of these clauses will be more apparent if we put them into the ordinary form of a legislative act. Thus, if instead of the general provisions in the constitution the convention had provided as follows: Be it enacted, that all persons who have been in armed hostility to the United States shall, upon conviction thereof, not only be punished as the laws provided at the time the offences charged were committed, but shall also be thereafter rendered incapable of holding any of the offices, trusts, and positions, and of exercising any of the pursuits mentioned in the second article of the constitution of Missouri;—no one would have any doubt of the nature of the enactment. It would be an *ex post facto* law, and void; for it would add a new punishment for an old offence. So, too, if the convention had passed an enactment of a similar kind with reference to those acts which do not constitute offences. Thus, had it provided as follows: Be it enacted, that all persons who have heretofore, at any time, entered or left the State of Missouri, with intent to avoid enrolment or draft in the military service of the United States, shall, upon conviction

thereof, be forever rendered incapable of holding any office of honor, trust, or profit in the State, or of teaching in any seminary of learning, or of preaching as a minister of the gospel of any denomination, or of exercising any of the professions or pursuits mentioned in the second article of the constitution;—there would be no question of the character of the enactment. It would be an *ex post facto* law, because it would impose a punishment for an act not punishable at the time it was committed.

The provisions of the constitution of Missouri accomplish precisely what enactments like those supposed would have accomplished. They impose the same penalty, without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition. Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected. Take the case supposed by counsel—that of a man tried for treason and acquitted, or, if convicted, pardoned—the legislature may nevertheless enact that, if the person thus acquitted or pardoned does not take an oath that he never has committed the acts charged against him, he shall not be permitted to hold any office of honor or trust or profit, or pursue any avocation in the State. Take the case before us;—the constitution of Missouri, as we have seen, excludes, on failure to take the oath prescribed by it, a large class of persons within her borders from numerous positions and pursuits; it would have been equally within the power of the State to have extended the

exclusion so as to deprive the parties, who are unable to take the oath, from any avocation whatever in the State. Take still another case:—suppose that, in the progress of events, persons now in the minority in the State should obtain the ascendency, and secure the control of the government; nothing could prevent, if the constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights.

A question arose in New York, soon after the treaty of peace of 1783, upon a statute of that State, which involved a discussion of the nature and character of these expurgatory oaths, when used as a means of inflicting punishment for past conduct. The subject was regarded as so important, and the requirement of the oath such a violation of the fundamental principles of civil liberty, and the rights of the citizen, that it engaged the attention of eminent lawyers and distinguished statesmen of the time, and among others of Alexander Hamilton. We will cite some passages of a paper left by him on the subject, in which, with his characteristic fulness and ability, he examines the oath, and demonstrates that it is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guarantees, secured by the Revolution, of the rights and liberties of the people.

"If we examine it" (the measure requiring the oath), said this great lawyer, "with an unprejudiced eye, we must acknowledge, not only that it was an evasion of the treaty, but a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and, instead of obliging the State to prove the guilt, in order

to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury. . . . It was a mode of inquiry who had committed any of those crimes to which the penalty of disqualification was annexed, with this aggravation, that it deprived the citizen of the benefit of that advantage, which he would have enjoyed by leaving, as in all other cases, the burden of the proof upon the prosecutor.

"To place this matter in a still clearer light, let it be supposed that, instead of the mode of indictment and trial by jury, the legislature was to declare that every citizen who did not swear he had never adhered to the King of Great Britain should incur all the penalties which our treason laws prescribe. Would this not be a palpable evasion of the treaty, and a direct infringement of the Constitution? The principle is the same in both cases, with only this difference in the consequences—that in the instance already acted upon the citizen forfeits a part of his rights; in the one supposed he would forfeit the whole. The degree of punishment is all that distinguishes the cases. In either, justly considered, it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one recognized by the laws and constitution of the State. I mean the trial by jury.

"Let us not forget that the Constitution declares that trial by jury, in all cases in which it has been formerly used, should remain inviolate forever, and that the legislature should at no time erect any new jurisdiction which should not proceed according to the course of the common law. Nothing can be more repugnant to the true genius of the common law than such an inquisition as has been mentioned into the consciences of men. . . . If any oath with retrospect to past conduct were to be made the condition on which individuals, who have resided within the British lines, should hold their estates, we should immediately see that this proceeding would be tyrannical, and a violation of the treaty; and yet, when the same mode is employed to divest

that right, which ought to be deemed still more sacred, many of us are so infatuated as to overlook the mischief.

"To say that the persons who will be affected by it have previously forfeited that right, and that, therefore, nothing is taken away from them, is a begging of the question. How do we know who are the persons in this situation? If it be answered, this is the mode taken to ascertain it—the objection returns—'tis an improper mode; because it puts the most essential interests of the citizen upon a worse footing than we should be willing to tolerate where inferior interests were concerned; and because, to elude the treaty, it substitutes for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law."

Similar views have frequently been expressed by the judiciary in cases involving analogous questions. They are presented with great force in *The matter of Dorsey*;* but we do not deem it necessary to pursue the subject further.

The judgment of the Supreme Court of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

AND IT IS SO ORDERED.

The CHIEF JUSTICE, and Messrs. Justices SWAYNE, DAVIS, and MILLER dissented. In behalf of this portion of the court, a dissenting opinion was delivered by Mr. Justice Miller. This opinion applied equally or more to the case of *Ex parte Garland* (the case next following), which involved principles of a character similar to those discussed in this case. The dissenting opinion is, therefore, published after the opinion of the court in that case.

* 7 Porter, 294.